ASPEN COURSEBOOK SERIES

THE PROCESS OF LEGAL RESEARCH

Practices and Resources

Ninth Edition

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KF
240
.S36
2016

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Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory US serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

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Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-6333-5

Names: Schmedemann, Deborah A., 1956- author. | Bateson, Ann L., author. | Konar-Steenberg, Mehmet, author.
Title: The process of legal research : practices and resources / Deborah A. Schmedemann, Professor of Law Emerita, William Mitchell College of Law (now Mitchell Hamline School of Law), Ann L. Bateson, Library Director, Associate Dean, and Professor of Law, University of St. Thomas School of Law, Mehmet Konar-Steenberg, Professor of Law and Briggs & Morgan/Xcel Energy Chair in Energy and Environmental Law, Mitchell Hamline School of Law.
Description: Ninth edition. | New York : Wolters Kluwer, [2016] | Series: Aspen coursebook series | Includes index.
Identifiers: LCCN 2016007495 | ISBN 9781454863335
Subjects: LCSH: Legal research — United States.
Classification: LCC KF240 .S36 2016 | DDC 340.072/073 — dc23 LC record available at http://lccn.loc.gov/2016007495

The Ten Practices of Skilled Legal Researchers

CHAPTER 2

The process of legal research is in many ways a set of interlocking practices. We use the word "practice" here in all of its meanings: an action that is repeated, that aims toward proficiency, and that is employed within a profession. Whatever the project, skilled legal researchers engage in ten practices, which are covered in concentrated form in this chapter and further developed in the following chapters.

1. Master your client's situation.
2. Develop your research terms.
3. Create a research plan.
4. Choose resources with care.
5. Piggyback on others' work.
6. Work several access angles.
7. Take a look back.
8. Get up to date.
9. Manage your information file.
10. Stop when you're done.

Note that our diagram for the set of ten practices is a circle. By this, we intend to convey the idea that research is not an entirely linear process. Rather, it is often recursive. You will execute some of these practices multiple times, with various secondary sources and primary authorities. Furthermore,

a research project may entail more than one topic, requiring more than one complete round of research. And it is not uncommon to start off in one direction, find it unproductive, and decide to go in a different direction. (The practices covered here are intended to make this experience as rare as possible, of course.)

Before we start discussing the ten practices, a word about terminology: In Chapter 1, a line is drawn between *primary authority*, which refers to the law, and *secondary sources*, which consist of commentary on the law. For conciseness, this and other chapters use the word *source* to refer to both primary authority and secondary sources. By distinction, a *resource* is a publication (whether a print book, government website, commercial database, or other publication) in which you find the source.

1. Master Your Client's Situation

You will conduct legal research to solve a real problem for a client, not as an exercise in idle curiosity. Thus, the first practice is to master your client's situation.

Investigating the facts of a client's situation is a complicated process well beyond the scope of this book. Suffice it to say that the process starts with interviewing the client; it often expands to include reviewing documents, interviewing other people, visiting pertinent locations, consulting experts, and perhaps conducting non-legal research. The latter may involve examining public records about the companies or organizations involved in a client's situation; it may also include non-legal research on a client's situation. For example, if you were working for All-Day Wellness as it seeks to constrain its departing employees from competing with it, you would research labor conditions within its industry.

The next step is to synthesize and summarize what you have learned for the purposes of your legal research. Synthesizing entails combining information from various sources on a single topic. For example, your client may tell you about a topic that is also covered in various documents; you would synthesize these bits of information. Summarizing entails identifying the main points from the reams of information that you obtain and deleting the unnecessary ones. Of course, before you conduct your legal research, you may not know what will prove to be legally important, so the best approach is to err on the side of including most points.

Many of the main points to identify in your summary are the facts of your client's current situation — what lawyers like to call the "real-world" facts (as distinct from what happens within the legal system). These facts can be captured through the classic questions journalists ask: who, what, when, where, why, and how. Similar questions should be asked about the ultimate desired outcome of the representation.

Sometimes you will research the law pertaining to a dispute, and the events will already have occurred. These questions are easy to answer in such

situations, unless you have conflicting views from different sources about what happened. Then you will need to encompass a range of possible facts in your summary. Sometimes you will research the law to prepare for a client's future transaction, such as a contract or will, and you will frame the questions about events that are anticipated to occur.

Equally important to identify in your summary is your client's legal and practical context. Before you start your research, you should know your client's legal context: Is the client involved in litigation? If so, are the proceedings criminal or civil?[1] At what stage is the litigation? Is the client involved in some other form of legal proceeding aimed at dispute resolution?[2] If the situation does not involve a dispute, what is the nature of the actual or potential transaction? As a further refinement, attend to the client's goals as to the outcome. For example, does the client seek to take an aggressive or conciliatory stance in litigation? Does the client seek a contract that benefits itself primarily or benefits both sides equally?

Furthermore, before you start your research, you should be clear about your client's expectations for your research, which set the practical parameters of your assignment. In what form is your research to be presented? How much time may you reasonably spend on the project? Are there any limitations on the resources you may use? Legal research is expensive because it takes your time and may involve fee-for-use resources. To provide your research services in a truly professional manner, you must respect your client's cost parameters.

Real-World Facts

- Who are the important actors?
- What happened between them or may happen?
- When did or will the events occur?
- Where did or will the events occur?
- Why did or will the events occur?
- How did or will the events occur?

Research Task

- What is my client's legal context?
- What are my client's goals?
- What form is my work to take?
- What is the time frame for my research?
- Are there limits on resources I may use?

1. In broad strokes, criminal prosecution involves the state bringing charges that may lead to fines and imprisonment. The classic civil case involves private parties suing each other.

2. This could be a proceeding before an administrative agency or in a private dispute resolution forum, such as mediation or arbitration.

2. Develop Your Research Terms

In a way, research is an elaborate word-find task, in which your goal is to find the few small portions of a huge trove of legal sources — each of which contains thousands of words — that pertain to your client's situation. Your research terms are the key to success. All of the ways that you access legal resources require you to use words; if you do not have the right words, you will not find what you need.

As discussed in Chapter 1, legal research sources consist of legal rules, the materials that lawmakers generate as they create legal rules (such as the facts of the dispute that judges include when writing a case), discussion of rules (as in an article), or some mix of these. Thus, in developing your research terms, your aim is to anticipate the words that the writers of sources pertinent to your client's situation may have used.

As you work on developing your research terms, keep two goals in mind. First, you want to achieve high *recall* — that is, to find a high percentage of the texts that pertain to your client's situation. Second, you also want to achieve high *precision* — that is, to avoid retrieving a large number of non-pertinent texts — because doing so will bog down your research. Too many required research terms lead to recall problems, whereas too broad terms lead to precision problems.

Some of your research terms will be fact-based. So begin by thinking about every facet of the real-world facts of your client's situation; work through the who, what, when, where, why, and how questions. Describe each one at a middle level of generality. For example, if your client's situation involves Cassie Collins, a driver involved in a car accident, the appropriate way to frame the *who* dimension of the situation is neither *Cassie Collins* (too specific), nor *person* (too general), but *driver* (which reflects the role that she played in the event). Then think about alternative terms for your initial terms; alternatives include synonyms, broader and narrower terms, words commonly used together, and even antonyms. For example, for the various questions posed by Exact Electronics, which arise out of the workplace, one good term would be *employee*; others might be *worker*, *laborer*, *employer*, *manager*, and *employment*.

Your other research terms will be legal words. So think next about whether you already know any legal concepts that are or may be pertinent. Concepts such as *liability*, *plaintiff*, and *damages* may be too broad to be of much use because they are so commonly used. For example, for the de la Cruz situation involving the boy suspended from public school for a statement that he shaved into his hair, a potentially pertinent area of law would be constitutional law, a major legal topic would be freedom of speech, and a subtopic would be the speech rights of a public school student.

To expand your initial framing of your legal research terms, incorporate your client's legal context. If your client is involved in litigation, a procedural term reflecting the phase of the litigation is likely to be very useful. Again, for example, if you were seeking to keep Daniel de la Cruz in school, you would be researching a preliminary injunction.[3] On the other hand, if your client is

3. A preliminary injunction is a court order that some action be taken while the litigation is pending.

planning a transaction, the legal term for that transaction is likely to be very useful. For example, in advising All-Day Wellness, which is trying to keep its employees from working for its competition when they leave their jobs, the probable solution would be a type of contract called a "covenant not-to-compete," which would be a good research term.

Of course, the paradox of research is that you do not yet know what you are seeking to know, so developing research terms can be a bit of a shot in the dark. Some legal words are uniquely legal words, whereas others (such as the contracts term "consideration") are used outside the law but have different meanings in legal and non-legal usage. You can reduce the risk of missing a useful word or—even worse—using a word improperly by spending some time with a legal thesaurus or dictionary. A thesaurus provides alternatives to the listed words; a legal dictionary provides the legal meanings of the listed words and may provide alternatives. See Box 2.1 for references to leading legal dictionaries and thesauri, along with their online availability.

Box 2.1 LEADING DICTIONARIES AND THESAURI

Black's Law Dictionary (10th ed. 2014)	Available on Westlaw
Ballentine's Law Dictionary (3d ed. 2010)	Available on Lexis
The Law Dictionary (7th ed. 1997)	Available on Lexis
Steven H. Gifis, *Barron's Law Dictionary* (6th ed. 2010)	Available on Bloomberg Law
Merriam-Webster's Dictionary of Law (rev. & updated 2011)	1996 edition available at http://dictionary.findlaw.com/
Daniel Oran, *Oran's Dictionary of the Law* (4th ed. 2008)	Third edition available online via EBSCOhost
Wex	Available at https://www.law.cornell.edu.wex
Bryan A. Garner, *Garner's Dictionary of Legal Usage* (3d ed. 2011)	
William C. Burton, *Burton's Legal Thesaurus* (5th ed. 2013)	

Legal dictionaries provide an impressive amount of information. As you can see in Box 2.2, for example, the entry from *Black's Law Dictionary* (generally regarded as the premier legal dictionary) for *covenant not to compete*